

**Lourdes Health Systems, Inc. and International Association of Machinists & Aerospace Workers, AFL-CIO, CLC. Case 26-CA-15520**

December 18, 1995

**ORDER GRANTING MOTION**

BY MEMBERS BROWNING, COHEN, AND  
TRUESDALE

On February 13, 1995, the National Labor Relations Board issued a Decision and Order finding that the Respondent violated Section 8(a)(3) and (1) by denying terminal benefits, including accrued vacation and sick leave pay, to economic strikers who had made unconditional offers to return but wanted to resign from employment prior to being recalled.<sup>1</sup> The Board found that the Respondent discriminatorily applied its notice and availability-to-work policy by stating that unrecalled, permanently replaced economic strikers would have to return to work, provide written resignation notice, and work during the notice period in order to receive terminal benefits, while awarding benefits to other employees who, like the strikers, were not on active work status when their employment ceased and thus could not comply with the policy's stated terms. The Board indicated its intent to award terminal benefits to strikers "who have resigned from employment and have accrued terminal benefits."<sup>2</sup> Prior to the commencement of compliance proceedings, the Respondent informed the Regional Office of its view that under the terms of the Board's Order, strikers who failed to submit written resignation letters are not eligible to receive terminal benefits.

On May 17, 1995,<sup>3</sup> the General Counsel filed a motion to clarify the Board's Decision and Order, contending that the Board's Order inadvertently denies make-whole relief to those striking employees who resigned but did not provide the Respondent with written resignation notice. On June 5, the Respondent filed a response in opposition to the General Counsel's motion to clarify, contending that the General Counsel's motion was untimely and that it lacked merit. On June 22, the General Counsel filed a motion for leave to file a response to the Respondent's opposition to the General Counsel's motion to clarify the Board's Decision and Order.

**Procedural Issues**

The Respondent contends that the General Counsel's motion to clarify should be denied because Section 102.48 of the Board's Rules and Regulations permits

only postdecisional motions for "reconsideration, rehearing, or reopening of the record," and does not authorize motions seeking clarification. The Respondent further maintains that the General Counsel's motion is untimely under Section 102.48(d)(2), which provides that postdecisional motions shall be filed "within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order." In this regard, the Respondent notes that the General Counsel filed his motion 91 days after the issuance of the decision, and did not set forth extraordinary circumstances or request an extension of time.

The General Counsel contends that Rule 102.48 covers all extraordinary postdecisional motions, including motions for clarification of the Board's decisions and orders, and that the Board should exercise its discretion to find that the motion to clarify was timely filed under the circumstances here. As described by the General Counsel, on February 21, the Regional Office mailed a letter to the Respondent's counsel setting forth the Respondent's compliance obligations and asking whether the Respondent intended to comply with the Board's Order. On March 2, the letter was returned to the Regional Office, indicating that counsel had a new address. The Region mailed the letter to the new address that same day, and placed several calls to counsel during the first 2 weeks in March. Counsel did not return any of the calls until March 15. The General Counsel asserts that it was not until March 20—after the 28-day period specified in Rule 102.48(d)(2)—that the Respondent informed the Regional Office of its interpretation of the Board's Order. Describing and relying on the Region's repeated and unsuccessful efforts in April and early May to contact the Respondent and/or to reach agreement on the scope of the make-whole relief ordered by the Board, the General Counsel maintains that he did not engage in protracted or inexcusable delay prior to filing the motion for clarification. The General Counsel also asserts that the Board should clarify its Order at this juncture because the ambiguity "cannot be resolved by lengthy compliance proceedings."

The Board has the authority to entertain motions seeking clarification of its decisions and orders and to determine, on a case-by-case basis, whether such motions are timely. See *St. Regis Paper Co.*<sup>4</sup> Exercising our authority under Section 102.48(d)(1), we find, based on the circumstances presented, that the General Counsel's motion for clarification was timely filed. We shall also consider the General Counsel's responsive brief.

<sup>1</sup> 316 NLRB 284 (former Member Stephens and Member Cohen; Member Truesdale concurring). Member Browning did not participate in the underlying decision.

<sup>2</sup> 316 NLRB 284 fn. 2.

<sup>3</sup> All dates are in 1995 unless otherwise indicated.

<sup>4</sup> 301 NLRB 1236 (1991) (the Board amended its Order to permit an additional discriminatee to be made whole for any loss of earnings attributable to his unlawful transfer; Board noted that it was resolving the issue many years after the unlawful conduct in question).

### Substantive Issues

As noted, the General Counsel has filed a motion to clarify. That motion is based on an ambiguity in the Board's Decision and Order. More particularly, the Board, at footnote 2, said that the remedial benefits would be confined to strikers "who have resigned from employment and have accrued terminal benefits." The "Amended Remedy" section reads the same way. However, the Order says that the remedial benefits will go to any striker, "who has resigned his/her position, *submitted a written letter of resignation*, and has accrued terminal benefits." (Emphasis added.)

Given the ambiguity, the task is to ascertain the Board's true intention. In this regard, we summarize the violation found as follows: As to strikers who wished to terminate their employment, the Respondent would not grant them their termination benefits unless they submitted a letter of resignation and then worked for 2 weeks. For the reasons set forth in the Decision, those conditions were unlawful.

Given the nature of the violation, the remedy requires that the Respondent cease and desist from imposing those conditions. It follows that any employee who expressed a desire to terminate his/her employment should receive the benefit without regard to the conditions. The form of the expression, i.e., written or oral, is irrelevant. On the other hand, this limited inclusion will not encompass any former striker who did not attempt to resign but may now try to claim that resignation would have been futile. Thus, in order to qualify for the remedy, an employee would have had to express to a management official a desire to terminate employment.

### ORDER

The General Counsel's motion to clarify the Board's Decision and Order is granted. Accordingly, the Board's Order in the underlying Decision (316 NLRB 284) is modified and the Respondent, Lourdes Health Systems, Inc., Paducah, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Make whole employees Mildred Englert, Barbara Wright, Patricia Rushing, Rosalee Barger, and Ella Sue Richie, and any other striking employee who expressed to management a desire to terminate his/her employment and has accrued terminal benefits, by paying the accrued sick leave and vacation benefits due them, plus interest as set forth in the amended remedy."

2. Substitute the attached notice for that of the administrative law judge.

### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coerce or discriminate against you in the exercise of your rights to engage in or refrain from engaging in union and other protected activities, including the right to strike, by withholding payments of accrued vacation and sick leave benefits.

WE WILL NOT tell employees, who, as former strikers, are on a recall list, that under our policy they cannot resign and receive accrued sick leave pay or accrued vacation pay, or other accrued benefits, unless they return to work, give adequate notice, and work out the notice period.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole employees Mildred Englert, Barbara Wright, Patricia Rushing, Rosalee Barger, and Ella Sue Richie, and any other employee who expressed to management a desire to terminate his/her employment and has accrued terminal benefits, by paying the accrued sick leave and vacation benefits due them, plus interest.

LOURDES HEALTH SYSTEMS, INC.